

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
REPLY BRIEF**



74-1955

To be argued by  
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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PMS

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UNITED STATES OF AMERICA. :

Appellee, :

-against- :

RICHARD BELANGER, :

Appellant. :

-----x  
Docket No. 74-1955

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



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I

A. Insufficiency of the Evidence

The Government argues, in response to the issues raised in appellant Belanger's main brief, that its evidence at trial was sufficient to sustain Belanger's conviction on both the substantive count and the conspiracy count of the indictment. Concerning the substantive count, which charged possession of 500 pounds of marijuana in Port Chester, New York, in late May,

the Government, while conceding that it introduced no evidence at trial to show that Belanger was still actively participating in the alleged conspiracy at this time or at any time thereafter, argues that his conviction on that count was justified under Pinkerton v. United States, 328 U.S. 640 (1945).

Pinkerton, however, does not rehabilitate the Government's failure of proof in this case. The Supreme Court, in that decision, held that a defendant, under agency principles, could be guilty of a substantive crime in which he did not actively participate only in those cases where the Government introduced evidence to show that the defendant had entered a conspiracy the scope of which he knew to include that substantive crime. In the present proceeding, the Government produced no such evidence.

Of the 2,200 pages of testimony and numerous hours of tapes introduced in this case, the Government can point to only two bits of evidence which it claims satisfy its burden of proof on this issue. The first consists of two casual references to a future trip by Mecca\* -- one before, and one immediately after, the aborted March trip. Significantly, there is no showing that these remarks were joined in or endorsed by other persons present. More important, however, these statements by Mecca cannot unilaterally bind Belanger to an agreement which he never desired, intended, or endorsed. The scope of Belanger's agree-

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\*Mecca was an alleged co-conspirator, whose case was severed below.

ment is determined by what he "promoted" and made "his own." United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), affirmed, 311 U.S. 205 (1940); United States v. Borelli, 336 F.2d 375 (2d Cir. 1964).

The second piece of evidence is the illegal smuggling of a quantity of marijuana by Belanger and Mecca during the preparation stages of the March trip. The record reflects that this was done because of the urgent need for funds to finance repairs on boats and the recent acquisition of a plane. This evidence therefore confirms, as appellant Belanger contends in his main brief at 21, that the urgent need for additional funds "at that time" was the specific and limited reason for the March trip. It does not support a finding that the May trip -- not conceived until months later, and of which Belanger was unaware -- was within the scope of the conspiracy as Belanger understood it.

For the same reasons, Belanger's conviction on the conspiracy count should be reversed and dismissed. The indictment charges a single overall conspiracy which encompasses trips from August 1971 to August 1973. The proof here fails to establish the appellant's intended or actual participation in the single overall conspiracy. Significantly, there was no evidence to show that he had knowledge of the overall conspiracy charged, and in particular insofar as the conspiracy was alleged to include the May transaction. Absent such proof, his conviction on the conspiracy count was invalid. Kotteakos v. United States,

328 U.S. 750 (1946).

Thus, the Government seeks to have this Court infer from the fact of the commission of the substantive offense by persons who were undisputedly engaged in all phases of the overall conspiracy the existence of an agreement to conspire to commit the substantive offense by appellant Belanger, whose participation in the conspiracy was limited to a single aspect of the conspiracy, i.e., the unsuccessful March trip. This is a misuse of Pinkerton. See United States v. Sperling, 506 F.2d 1323, 1341 (2d Cir. 1974) (Timbers, C.J.); United States v. Miley, slip opinion 2363, 2391-2392 (2d Cir., March 19, 1975). Moreover here, unlike the situations in those cases, the error was prejudicial, since here there was no showing of Belanger's participation in the substantive offense. Thus the finding of guilt rests entirely on the Pinkerton theory.

#### B. Deficiencies in the Charge

The Government's contention at 15 of its brief that the defendants received more than they were entitled to when the Court gave the jury the "all or nothing" charge, does not hold true as to appellant Belanger, who was involved only in the March trip. To the contrary, it was extremely prejudicial, since, in order to acquit Belanger on the conspiracy count, the jury would also have been compelled to acquit those defendants who undisputedly participated in the overall conspiracy,

which encompassed the May and June trips. It is the "all or nothing" instruction in precisely this type of situation which led this Court, in United States v. Kelly, 349 F.2d 720, 757-758 (2d Cir. 1965), to reverse as to the defendant Schuck, whose involvement was shown in only a single aspect of the overall conspiracy:

This was the equivalent of an instruction that the jury could not acquit Schuck on the conspiracy count without also acquitting Kelly and Hagen. Nothing could have been more helpful to Kelly and Hagen, who naturally do not raise the point here, and, by the same token, nothing could have been more prejudicial to Schuck. As noted in Borelli, 336 F.2d at pages 382-383, as we interpret the holding, this error is of such grave consequence to Schuck as to fall into the category of "plain error" to be taken into consideration even if not noted by counsel at the trial. However, it is only fair to the trial judge to say that, had Judge Friendly's opinion in Borelli been filed and thus brought to the attention of the trial judge of this case the "all-or-nothing" instruction would not have been given. Furthermore, lest the matter be left in any doubt, we hold that the "all-or-nothing" instruction in this case was "plain error" requiring reversal even in the absence of objection at trial. Fed. Rules Crim. Pro., 52(b).

## II

Appellant Belanger joins in those arguments of the co-appellants in this case which are not inconsistent with the arguments made on appellant Belanger's behalf.

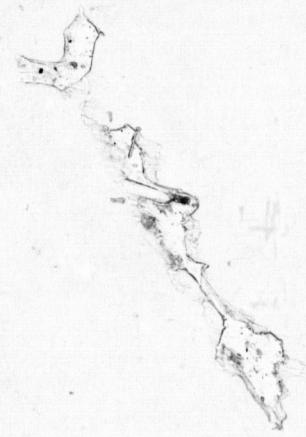
CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant Belanger, the convictions on both counts should be reversed and the indictment dismissed.

Respectfully submitted,

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Certificate of Service

May 2 , 1975

I certify that a copy of this <sup>reply</sup> brief has  
been mailed to the United States Attorney for the Southern  
District of New York.

personally served on

E. Thomas Boyle